

THE STATE OF SOUTH-CAROLINA.

CHARLESTON, JULY 1842.

HUGH WILSON, WILLIAM M'CANTS, EDWARD BECKET, HUGH
WILSON, Jr., *Complainants,*

AND

THE PRESBYTERIAN CHURCH OF JOHN'S ISLAND AND WADMA-
LAW, THOMAS LEGARE, KINSEY BURDEN, and ELIPHA
WHITE, *Defendants.*

HARPER, Ch.

By his Will, dated in 1735, Robert Ure, of John's Island, supposed to have been a native of Scotland, bequeathed as follows :

"As to one moiety of my estate, unto Joseph Stanyarn, Wm. Holmes, and Thomas Upham, and their assigns, in trust, and to the intent and purpose that the said Joseph Stanyarn, William Holmes and Thomas Upham, and their assigns, (in manner hereinafter mentioned to be appointed,) shall immediately, or as soon as conveniently may be, after the sale and division to be made as aforesaid, put out the same at interest, on good and sufficient securities ; and from time to time, and at all times thereafter, shall yearly and every year, well and faithfully pay, and apply the interest therefrom arising, to the sole use and behoof, and for the maintenance of a Minister of the Gospel, according to the Presbyterian profession, who is, or shall be thereafter, from time to time regularly called and settled on John's Island, in Colleton county in the said province, and who shall acknowledge and subscribe the Westminster Confession of Faith, as the confession of his faith, and shall firmly believe and preach the same to the people there committed, or which shall hereafter be committed to his care and pastoral inspection."

It appears from the inventory and appraisement of the estate of Robert Ure, that the entire value of the estate was estimated at £3656 12s. It appears that the Presbyterian Church, or

Congregation of John's Island, had been in existence a considerable time before the bequest, and its origin cannot be distinctly ascertained.

By a deed dated 24th December 1754, one Robert Turner, in consideration of £600 currency, conveyed to five Trustees therein named, a tract of 250 acres of land, in trust, "that they shall from time to time, and at all times hereafter, permit and suffer the Minister or Pastor for the time being, of the Protestant Presbyterian Church, or congregation of Christians which do, and shall usually meet and assemble together for divine worship, at or in their public meeting-house on John's Island, in the said county and province, during the time he shall so be and continue Minister or Pastor of the said congregation, according to the rules and discipline of Presbyterian Church government, and no longer peaceably, and quietly to enter into, have, hold, occupy, possess and enjoy the said piece or parcel of two hundred and twelve acres of land, together with the houses, edifices, premises, and appurtenances thereunto belonging, as tenant or tenants, for years, without impeachment for waste."

It is probable that this land was afterwards sold, for there was in evidence a mortgage of the date of the 14th May 1799, of the same land, to James Legare, Hugh Wilson, and Thomas Hanscome, as Trustees for the Presbyterian Church, to secure the payment of the sum of £512. There was in evidence a receipt of James Legare, as Treasurer of the Presbyterian Church, to Hugh Wilson, for certain specialties, amounting to £2243 14s. 8d. dated 19th August 1809. Some of the bonds for which the receipt was given, purported to be payable to the Trustees of the Presbyterian Church. It seems that the Church is in possession of land on which the Church is built, but of the mode of its acquisition I am not informed. About the year 1822, it was found necessary to rebuild the Church,—and for this purpose a subscription was raised to the amount of \$3645. To this there contributed not Presbyterians alone, but also Methodists and Episcopalian. The Church is stated to be in possession of stocks and money, in the hands of the Treasurer, some of which funds are known to be derived from an old *John's Island Society*, which was composed of Presbyterians and Churchmen;—and becoming nearly extinct, the funds were divided between the Churches by the surviving members. The amount received from this source, by the Presbyterian Church, was about \$4000. By a deed of the 6th of July 1820, Thomas Hanscome conveyed to James Legare, Sen., Thomas Legare, Sen., and Hugh Wilson, Jun., Trustees of the John's Island Presbyterian Church, fifty-six acres of land on John's Island, and by his Will gave and bequeathed "to the Presbyterian Church of John's Island, whatever may be its corporate

name or title in law, the sum of \$6,000." It appears in evidence that Mr. Hanscome was not a member of the Church, nor of any Church,—indifferent about forms of Church government, and induced to make his donation by his regard for the members of the congregation, and the good he supposed the Church might effect. The Church was incorporated in 1785 by an act of the Legislature, and in consequence, it is said, of that act having fallen into oblivion, again incorporated in the year 1835, by the name of the "Presbyterian Church of John's Island and Wadmalaw." Provision was made by the Will of Ure, and the deed of Turner, for keeping up a succession of Trustees. How the succession has been kept up, or whether the present Defendants, named as Trustees, properly represent the original Trustees, does not appear; nor is it material in the view which I shall take of the case.

At the time of the donation of Ure, it does not appear that there existed any Presbytery in the State of South-Carolina, nor until after the conveyance of Turner in 1754. Though it appears probable, from the private journal of a Presbyterian Clergyman, which was read to the Court, that a Presbytery did exist in 1755. That it existed in 1754, or that the John's Island Church was connected with it, however, I do not consider established by evidence. The first connexion with any ecclesiastical judicatory, which is shown, was with the "Charleston Presbytery," which was incorporated in 1790, long after the first incorporation of the Church. While the Charleston Presbytery was still in existence, there existed another Presbytery in the State, called "the South-Carolina Presbytery." About the year 1799, the South-Carolina Presbytery was divided into two Presbyteries, called the First and Second Presbyteries of South-Carolina. The First Presbytery was afterwards called the Harmony Presbytery; and about 1823, the "Charleston Union Presbytery" was formed, by the union of part of the Harmony Presbytery with the South-Carolina Association of Congregationalists. That the John's Island Church did maintain a connexion with this last named Presbytery, by sending delegates to it, making contributions, and otherwise, I consider sufficiently established; and that the connexion was maintained, with more or less regularity, up to the date of the resolutions hereafter to be mentioned. A General Assembly of the Presbyterian Church was organized by the Synod of New-York and Philadelphia, to which the Charleston Union Presbytery afterwards adhered. I consider it also sufficiently proved, that the John's Island Church did send delegates to the General Assembly thereby recognizing its authority. In 1838 occurred the well known schism, by which the Presbyterian Church was divided into two bodies, commonly known by the names of the old and new school. This was effected by the secession of a minority

from the General Assembly, claiming to be the true Presbyterian General Assembly of the United States. The majority which remained, known as the old school, was declared by the judicial authorities of Pennsylvania, to be the true corporate General Assembly, which had been before created by the Legislature of Pennsylvania. This last Assembly is designated as that which met in the Seventh Presbyterian Church of Philadelphia, and of which Mr. Plumer was Moderator.

This General Assembly passed various ordinances, and among other things, provided that "In case the majority of any Presbytery shall refuse, or neglect to take proper order in regard to its seceding commissioners, or shall approve their conduct, or adhere to the new sect they have created, or shall decline, or fail to adhere to the Presbyterian Church in the United States of America, upon the said basis of 1837 and 1838, for the reform of the Church,—then, and in that case, the minority of said Presbytery shall be held and considered the true Presbytery, and shall continue the succession of the Presbytery, by its name and style, and from the rendition of the erroneous and schismatical decision, which is the test in the case, be the Presbytery ; and if sufficiently numerous to perform presbyterial acts, shall go forward with all the proper actions and functions of Presbytery." And in like manner the said General Assembly ordained, "That the principles of this act should be applied to *Churches*, with their majorities and minorities ; and to Church sessions, as far as they are applicable." These ordinances were approved and sustained by the *Synod of South-Carolina and Georgia* ; of which ecclesiastical body, the Charleston Union Presbytery was a component part. At a meeting of the Charleston Union Presbytery, on or about the 4th day of December 1838, resolutions were introduced, declaring the adhesion of the Presbytery to the General Assembly which met in the Seventh Presbyterian Church in Philadelphia, of which Mr. Plumer was Moderator. These resolutions were overruled by, what I must consider the vote of a majority ; whereupon the minority withdrew, and formed themselves into a separate Presbytery. On or about the twenty-fourth of December 1838, there was held a semi-annual meeting of the Church of John's Island and Wadmalaw. At this meeting a preamble and various resolutions were passed, and among others, the following :

"Resolved, That the Presbyterian Church of John's Island and Wadmalaw, feeling its dependence upon the Great Head of the Church, acknowledging its obligations to Him for past mercies, and trusting in Him for the future, and desiring to cultivate and maintain a spirit of harmony and unity within itself, and without which, its usefulness must be destroyed, does hereby declare itself an "Independent Presbyterian Church" absolved from all con-

nexion with the "Charleston Union Presbytery," and every other ecclesiastical body, and placed upon the same ground occupied by other Presbyterian Churches in our neighborhood."

These resolutions were passed by a majority of twelve to three. The majority of the Church have acted in pursuance of their resolution, and refused to recognize any superior ecclesiastical jurisdiction. The Complainants filed their Bill on behalf of themselves and others, the minority of the congregation or corporation of the John's Island Church, claiming to be the true Presbyterian Church of John's Island and Wadmalaw. They state that they have organized themselves as a Church, by the election of elders according to the Presbyterian practice, and have been recognized as such true Church, by the Presbytery, the Synod of South-Carolina, and the General Assembly of the United States, known as that of the old school, and this is admitted by the Answer. They claim to be entitled, as the true Church of John's Island and Wadmalaw, to all the funds which were given for the support of that Church; they pray that all the funds and property in the hands of the Treasurer, the Trustees, or the Corporation, may be paid, or delivered over to them, the minority, as worshiping and governed by the discipline, directory, and rule, of the Presbyterian Church. As I have before said, with respect to the funds which were given to Trustees, it does not appear whether there has been a due succession of Trustees, or whether the present Trustees properly represent the original donors, or whether they must be regarded as vested in the aggregate corporation. I shall take it for granted, that they are so vested in the corporation, which must also be regarded as a Trustee.

I regret that suits relating to ecclesiastical affairs have become common in our Courts, and that undefined and mistaken views have been entertained, in relation to the powers of the civil and ecclesiastical tribunals. I think it necessary to repeat, what other Judges have thought it necessary to say, that the civil tribunal possesses no authority whatever, to determine on ecclesiastical matters—on a question of heresy, or as to what is orthodox, or unorthodox, in matters of belief. So the ecclesiastical tribunals have no authority, as recognized by the law, to entertain any civil question, or in any manner effect a disposition of property by the decisions of their judicatories. I think that some difficulty may have arisen, from the ambiguous use of the word *church*. In one sense, (and the common sense) the word *church* is understood to mean a number of christian persons, agreeing in their faith, usually assembling together at one place, for purposes of worship,—submitting to its ordinances, and receiving its sacraments. This is entirely distinct from the meaning of the word "church," as applied to a corporation. In the former sense of the word, many

persons are usually members of the church,—and most commonly a large majority, who neither are, nor can be, members of the corporation, married women, infants, and slaves. When persons are incorporated by the name of “church,” this can be regarded only as a name of designation,—or at most, as indicating, when property is given to them, the trusts upon which it is given. This does not constitute the *corporation* a *church*, in what I consider the proper sense of the word, any more than if they were called by any other name. Nor do I consider a corporation, for the managing of church funds, can properly be called an *ecclesiastical* corporation, any more than if property were given to the South-Carolina Society, for the support of the Minister of St. Michael’s Church. In either case, they are merely regarded as Trustees for the entire body of worshippers, and are merely a civil institution for the management of property. It is solely from their having the management of funds, or revenues given for a specific purpose, that this Court has any power to control or interfere with them. The doctrine is explained by Lord Commissioner Eyre, in the *Attorney General vs. Governors of the Foundling Hospital*, 2 Ves. jun. 47. Where property is given in trust for a particular purpose, it pertains to the ancient jurisdiction of this court to compel the execution of the trust, whether the trustee be an individual or a corporation; and in either case, perhaps, if there have been a great abuse of the trust, to remove the trustee, and direct the transfer of the trust funds to other trustees. See what is said by the Master of the Rolls, in the *Attorney General vs. the Earl of Clarendon*, 17 Ves. 499. Apart from this, the Court has no power to determine any thing with regard to the corporation, or its members. It has no power to declare the corporation dissolved for any abuse of its powers, or to remove an individual corporator, for any disqualification or misconduct whatever. If there have been such an abuse of power as to defeat the purposes for which it was created, the corporate franchise may be declared forfeited in another tribunal. But in no tribunal whatever, is there authority to interfere between the members of a corporation regarded as a *majority*, or *minority*, or to decide which of them is entitled to exercise the corporate franchises, as pursuing the true purposes of their institution. That the majority must govern is the general rule of corporations, unless something else be expressed by their charter. And I repeat, that this Court cannot control, or interfere with that majority, in any manner whatever, except to correct the misappropriation of trust property or funds. Regarded as a minority of the corporation, the Complainants have no standing whatever in Court, nor any title to be heard; though as *cestus que trust*, regarding the corporation as Trustee, they may individually have some interest, which they have a right to

call upon the Court to enforce. As the civil tribunals have no right to interfere with any thing but property, so the ecclesiastical judicatories have no authority whatever, except over spiritual matters; nor any means of enforcing their determinations, except spiritual ones,¹ spiritual censures, appeals to the conscience, or the refusal of communion. Their jurisdiction is over the church, in the sense which I have first attributed to the term. If any member of that church shall be found guilty of heresy or immoral conduct, they may inflict those spiritual penalties of censure or excommunication. But they have no power at all over the corporation, so as to affect its existence, or dispose of property. If every member of the corporation should be excinded from the spiritual church, this could not affect it, although on the justest grounds. If every member of the corporation were guilty of the grossest heresy—were infidels or musselman—the ecclesiastical authority would have nothing to do with that—nor any other tribunal, unless there should be a breach of trust with regard to matters of property. Indeed it happens every day, that in incorporating churches, as they are called, men of the most various religious tenets are made members of the corporation—thinking it better, when they cannot support a church of their own denomination, to contribute to the support of another. This may apply even to Deists or Atheists, who having no religion themselves, may think it a useful moral or political engine. There are various qualifications to constitute a corporator, such as contribution of money, holding a pew—but none of them having any thing to do with opinions or spiritual qualifications. That the minority of this congregation were recognized and declared by the ecclesiastical anthorities, as the true Presbyterian Church of John's Island and Wadmalaw, cannot of itself, have the slightest effect, so far as any question of property is involved. If property were given to a church, expressly so long as it should continue connected with a particular Presbytery; and if upon the church's being excinded for any heresy, ecclesiastical offence, or irregularity, this would operate a forfeiture of the property, (on which point I give no opinion;) it would not be in consequence of any authority of church tribunals over property, but the power which the owner has over his own property, and which he has delegated to them as individuals, or as a corporation. He might have delegated a similar power to any lay individual or corporation, to determine when a forfeiture was incurred. We come then to the question, whether there has been a breach of trust on the part of these Defendants. The donations of Mr. Hanscome were to the Presbyterian Church—and so far as I can collect, such was that of the John's Island Society. The contributions for rebuilding the church, by whomsoever made, were for a Presbyterian Church. Supposing this

property to be vested in the corporation, I take for granted that it must have been in trust for the "Presbyterian Church of John's Island," in that which I regard as the proper sense of the word. I shall not at present inquire respecting the terms of the donations of Ure and Turner. The question then is, whether the Defendants have applied the funds and property in their hands to any other purpose, than the support of the Presbyterian Church of John's Island and Wadmalaw.

The first and principal ground taken by the Complainants is, that it is no longer a Presbyterian Church at all, inasmuch as it is not connected with any Presbytery; which is said to be essential to the character of a Presbyterian Church. It is said there can be no such thing as an Independent Presbyterian Church. The case of the Trustees of the English Presbyterian Congregation in the Borough of York *vs.* James Johnson and others, (of which a newspaper report was furnished me, but which is said to have been since reported, 1 Watts & Sergeant, 1,) is fully in point to the present. In that case, donations were made to Trustees in trust for the English Presbyterian Congregation, which was afterwards incorporated. After the incorporation, the congregation connected itself with the Presbytery of Carlisle, which afterwards became connected with the General Assembly. On the division of the General Assembly in 1838, the Presbytery of Carlisle adhered to that which is known as the Assembly of the New School. In October 1838, by the vote of a majority, the congregation resolved, as in the present case, that "It is inexpedient, for the present, to recognize the jurisdiction of any of the conflicting church judicatories, which might claim authority over them." A minority of the congregation separated from the majority, and as in the present case, filed their bill claiming to be the true Presbyterian Church, and entitled to the church building and property; they having adhered to one of the sects of ecclesiastical judicatory. It was determined by the Court, that though the founder of such a charity, may make it an express condition of his gift, that the church shall be connected with a particular ecclesiastical authority, yet he had not done so in that case, "the beneficiary being described as the English Presbyterian Congregation, evidently to individuate it; and that subjection to a particular assembly, was not a condition of the grant, is proved by the fact, that there was at that time no such assembly in America." The judgment of the Court was in favor of the majority. The subject is very fully considered by the Assistant Vice-Chancellor Hoffman, in the case of Gable and others *vs.* Miller and others, decided in 1842; which I have in pamphlet. In that case, the church had been originally formed as an Independent German Reformed Church. It subsequently connected itself with the Classis of the Dutch Reformed

Church. With various interruptions, the connection continued until 1837, a few years before the filing of the Bill. It then declared its resolution to withdraw from its connection, and did withdraw accordingly. The Bill was filed, charging that the congregation had lost their church character by this secession, and claiming the property, as I understand for the minority. The Bill was dismissed. The Vice-Chancellor draws a distinction between the dedication of property to support peculiar tenets, and its dedication to support such tenets, in connection with, and subjection to, a particular church government. He seem to conclude, that where the church was originally an independent church, and afterwards connects itself with a particular ecclesiastical judicatory, its subsequent secession will not operate a forfeiture of the property; but if had been originally formed as a constituent part of such judicatory, the case might be different. This applies to the case now before us. But I find some difficulty in agreeing to the latter part of his conclusion. As I have before said, it must depend on the intention of the donor, and the intention must be collected from his words alone. But where the donor simply gives to the John's Island Presbyterian Chnrch, how can I infer the intention that it shall be in connection with, or subjection to, the Charleston Union Presbytery. Even in the case, where the party gives to a particular church, and describes it as being at present connected with a particular ecclesiastical body, I do not perceive that these can be regarded as any thing more than terms of description, or how they can express a condition of forfeiture, upon the withdrawal from such connection. The argument, however, is, that connection with a Presbytery is so entirely essential, that no church can answer the description of a "Presbyterian Church," unless in such connection. It might seem a sufficient answer to this to state the fact, that this church existed—that donations were made to it—and that it was incorporated,—when, so far as we know, no such connection existed. It is said, however, that there is an exception in cases of necessity. But this is only saying, in other words, that it is not essential. Of the witnesses examined, two clerical gentlemen expressed the opinion, that a Presbyterian Church could not exist, unless in connection with a Presbytery, where such connection is practicable. Yet one of these gentlemen (the Rev. Mr. Forrest,) stated himself to be pastor of an Independent Presbyterian Church. He referred this, however, to the necessity of the case,—as he himself was ordained by the Preshytery of Edinburgh. And he stated, that the Church of Scotland does not fully recognize the Presbyterian Church of America, or perhaps the validity of its ordination. Yet his congregation are not members of the Church of Scotland,—and it was in proof, that previous pastors of the same church were

ordained in America. Though the Church of Scotland may not recognize the validity of American ordination, the American recognizes the validity of Scottish ordination, and I see nothing to prevent this church being represented in Presbytery. Are we to suppose, that it was essential to the Presbyterian character of this church, that it should be connected with a Presbytery, while Mr. Buist was minister, and should not be so, while Mr. Forrest was minister. I can account, however, for the impression of this gentleman. He is a native of Scotland, where the Presbyterian religion is part of the *law of the land*. The Scottish Act of Parliament was referred to in argument, though it is not now before me. That act establishes the church government by *Sessions, Presbyterys, &c.* It is probable, that the territorial limits of the various Presbyteries are defined by law, and the churches within these limits subjected to the authority of the Presbytery; which, there, has more than mere spiritual authority. Three other clergymen expressed the opinion, that connexion with Presbytery was not essential to the character of a Presbyterian Church, but only government by church sessions. And, for manifest reasons, I must hold this to be the better opinion. Are Courts to investigate, when the exception from necessity exists? It is said that three ministers and congregations are necessary to constitute a Presbytery. In the case of a single church, constituted in a newly discovered country, there can of course be no Presbytery. But are we to pronounce that it loses its Presbyterian character, upon the establishment of two other churches in the same country. Within what distance is it necessary that the newly established churches should be? Are they bound to unite, though they should be separated by the utmost limits of India or America? If it be essential to the character of the church, and without any express declaration, it forbears or refuses to send delegates, for how long a time shall this recusancy continue, before we shall declare its character forfeited? It is very evident, that regarding it as a *duty* of every Presbyterian congregation to be connected with, and governed by a Presbytery, it is merely a matter of *spiritual* duty; the neglect or nonperformance of which, may subject the offenders to spiritual censure, or spiritual excommunication of the judicatory--may attach upon their consciences--but cannot incur any temporal forfeiture. It would be a dangerous power to attribute to ecclesiastical tribunals --the power to dispose of the property of the citizen by means of its excommunication,—and one which, I am sure, the churches in this country are very far from desiring. Another ground on which the property is claimed by the complainants, is, that the present minister of the church is heretical in his religious opinions, so that he cannot come within the description of a *Presbyterian minister*, or the congregation that employs him, of a *Presbyterian*

congregation. Here again I must inquire into the meaning of words. The donation of Ure is for the support of a minister who shall acknowledge and subscribe the Westminister Confession of Faith, as the confession of his faith, and shall firmly believe and preach the same; and that of Turner, to him who shall be the minister or pastor of the said congregation, according to the rules and discipline of Presbyterian church government. The other donations are simply to the Presbyterian Church.

First, I inquire what is a Presbyterian minister? The meaning of this, like the meaning of every other word, must be settled by usage, and the common understanding of mankind. As I have said, I have no jurisdiction to try or determine any question of heresy or orthodoxy. Perhaps half of the whole number of individuals, who are known by the name of *Presbyterians*, in the United States, entertain the opinions which I understand to be attributed to the gentlemen in question. As observed by Chief Justice Gibson, in relation to the separation of 1838, "Though it was held by this court, in the *Commonwealth v. Green*, 5th Whar. Rep. 531, that the party which happened to be in office, by means of its numerical superiority at the time of the decision, was that which was entitled to represent it, and perform the functions of the original body: it was not because the minority were thought to be any thing else than *Presbyterians*." Indeed, as he observed, the individuals entertaining those opinions were recognized as *Presbyterians* by the very men who afterwards declared them to be heretical, and not to conform to the true Presbyterian doctrines and discipline. What is called the old school party succeed at law, on account of their numerical superiority, but this gave them no higher authority to decide on the heresy or orthodoxy of the other party, any more than the new school had to decide on their heresy or orthodoxy. Similar in effect was the decision of the Vice Chancellor, Gridley *v. Jessup*, against the Trustees of the Presbyterian Congregation in Florida,—though in that case the congregation adhered to the new school, and the bill was filed by the minority. The Chancellor says, "The majority of the church and congregation, it seems, are in favor of the present incumbent; and it does not appear that he is of a denomination different from that, for whom the funds were designed." At the very time when the minister in question was employed by this congregation, and for a long while afterwards, he was a member of the various ecclesiastical bodies now claiming to be the exclusive orthodox Presbyterian Church in the United States. Evidence was offered of heretical opinions expressed by this gentleman, as I understand it, in the Synod of South-Carolina—which I rejected. These opinions were expressed as a member of that body, who did not, on that account, separate him from their association or communion, but continued to recognize his ministerial character.

I rejected the testimony, because I am not a judge of heresy. It does not follow, that because an individual may entertain heretical opinions, according to the views of a particular church, that he therefore ceases to be a member of that church. Hooker, in his Ecclesiastical Polity, lays it down that a heretic continues a member of the church, though he may be for the time excluded from its communion. There are heresies of a graver and of a lighter character. Perhaps there is no church which does not include many members, who, on some points, entertain opinions which would be thought heretical by the great body of that church, and which are yet not thought of sufficient importance to induce their exclusion. While individuals are regarded by the church itself, and the common understanding of mankind, as members, is not for courts to excommunicate them for heresy. Suppose the present Bill had been filed previous to the schism of 1838, and while Mr. White was still a member of the Charleston Union Presbytery, of the Synod of South-Carolina, and of the General Assembly. Is it imaginable that such a Bill could have been sustained? Yet I suppose his opinions were as heretical then, as they are now.—Can it make a difference, that one ecclesiastical body has since pronounced them heretical, when, as I have said, regarding the matter as a Judge, and deciding as a Court, another body of equal authority has pronounced them orthodox.

But it is said, that though I may have no jurisdiction to determine what is orthodox or heterodox, yet I am bound to execute a trust according to the intention of the donor of the property; and terms of Ure's Will, and of Turner's Deed, are referred to as evidence of what they thought orthodox Presbyterianism; and it is argued, that the testimony ought to have been received, to shew that the minister's opinions were not in conformity to their standard of Presbyterianism. Ure's donation is for the support of a minister who shall subscribe the Westminster Confession of Faith, and shall firmly believe and preach the same. The Defendant Mr. White, in reply to interrogatories on the subject, declares that he has subscribed the Westminster Confession of Faith, and adopts it as the confession of his faith. No evidence was offered that he ever preached any doctrine incompatible with that confession. We can only know what men believe by what they profess, and he has made his profession by his answer. Nor do I understand the testimony to have been offered with a view to shew that he disclaimed the authority of the Confession of Faith, but that while professing to submit to it, he expressed opinions in reality incompatible with it.

Both parties profess to found their faith on the Westminster Confession, though differing, it is said, in their construction of it; and I am, in effect, called on to decide that the profession of one

party is so palpably unwarranted, that I must hold the profession to be insincere. For a sincere profession is all that is required. And this brings me back to a part of the subject which I have already disposed of. I cannot enter into the question of sound or heretical construction, when, by the common consent of all parties, neither construction is incompatible with the Presbyterian character, which is founded on the recognition of the same Confession of Faith. Among the articles of the Church of England, are some which would be thought by one set of men, to be as explicit, and as incapable of misinterpretation as any portion of the Confession of Faith. These articles must be subscribed by all the ministers of that Church. Yet it is known that a large proportion, perhaps a majority, of the ministers of that Church, put on them an interpretation as widely different from what others would regard as their clear, explicit, and unequivocal meaning, as have ever occurred with regard to the Confession of Faith.— Yet it has never entered into the mind of any one to conceive, that the holders of the various opinions are not all true ministers of the Church of England; or that if property were given for the support of the ministry, courts should set themselves to construe the articles, and decide whether the incumbent were of the high or low church party, as they are sometimes distinguished.

With regard to the deed of Turner, it provides for the support of a minister or pastor, according to the rules and discipline of the Presbyterian Church Government. What is here meant by church government? It could not mean government according to the Scotch system of Presbyteries, Synods, and General Assembly, for there was no General Assembly, no Synods, and as far as we know, no Presbytery. It must mean the rules and discipline of church government which were essential to the constitution of the Presbyterian character, under the existing circumstances. This, according to the testimony of the clergymen who were examined, consists in the government by church sessions. Indeed, according to the views I have before expressed, no more than this can be necessary, in a legal point of view, under any circumstances.

It is ordered and decreed, that the Bill be dismissed.

From this Decree the Complainants respectfully appeal, on the grounds:

1. Because the Complainants established by sufficient evidence, that the funds in the possession of the Defendants, had been originally devoted by the founders "to the sole use and maintenance of a minister of the gospel, according to the Presbyterian profes-

sion, and who shall acknowledge and subscribe the Westminster Confession of Faith, as the confession of his faith, and shall firmly believe and preach the same to the people committed to his care, during the time he shall be and continue minister or pastor of the congregation, according to the rules and discipline of Presbyterian Church Government, and no longer." And therenpon it was further proved, that the Defendants being thus Trustees of the said fund, had applied, and were applying the same to the support of a minister, who, together with the majority of his congregation, were no longer members of the Presbyterian Church, and had departed from its discipline and church government.

2. Because the Complainants offered testimony to prove that the minister, for whose support the Defendants were using the said funds, did not believe or preach the Westminster Confession of Faith, but believed and actually preached doctrines contrary to that profession, but the Chancellor refused to admit the same in evidence.

3. Because unity of action, and the means of perpetuating itself are essential features of the Presbyterian Church: and that the first of these features is preserved in that portion of its organization, which combines the whole church into one body; and the other is provided for in the succession of the ministers, which the Presbytery alone are authorized to ordain; that the first of these is an important element,—but the last is so essential, that without it, no Presbyterian Church can be said to exist.

4. That all ecclesiastical authorities upon Presbyterian Church Government concur in declaring, that several churches must unite to form a Presbytery; and that therefore an Independent Presbyterian Church is an anomaly which cannot consist with the Presbyterian system.

5. That the Presbyterian Church of John's Island for many years—from as far back as the year 1755, was regularly connected with other Presbyterian Churches, and with all the judicatories recognized in such connection; and continued in such connection until the schism in 1838, when the Defendants, a majority of the congregation, declared the church independent and separate,—and by such separation, they ceased to be a Presbyterian Church, in the sense in which such Church was founded; and no longer had a right to apply the funds to the support of such a church, which had been devoted as aforesaid, to the support of a minister.

6. Because either the civil, or ecclesiastical tribunals, must decide whether the objects of the trusts are fulfilled. If the civil decline to decide the question, as involving matter of faith and discipline belonging to the ecclesiastical, then in this case, the question has been decided for them, inasmuch as the ecclesiastical

judicatory has declared for the Complainants, and rejected the Defendants as schismatical. If the civil tribunals entertain the question, then the Chancellor erred in refusing the proof tendered, and in dismissing the Bill.

7. Because the Complainants, as members of the Presbyterian Church of John's Island, are entitled to the protection and aid of the Court, in preventing the diversion of the fund by the corporation holding it in trust, to a purpose contrary to that trust,—and are entitled to a decree, ordering the fund to be applied to the objects to which it was originally devoted.

8. Because the Complainants, in fact, form and constitute the ecclesiastical body, for whose use the fund was devoted ; and the Defendants are merely a corporation acting as Trustees for the ecclesiastical body, and are bound to apply the said funds for the use and benefit of that ecclesiastical body, and according to their direction, in carrying out the trusts to which the funds are dedicated.

9. Because the evidence offered to the Court, to prove the religious tenets of the Defendant, Elipha White, ought to have been received.

10. Because trust funds in the hands of a Trustee, dedicated by the donor of these funds to a specific lawful purpose, cannot be diverted from that purpose by the Trustee.

M. KING, *Complainants' Solicitor.*

HUGH WILSON, *et al* vs. THOMAS LEGARE, *et al.*

COURT OF APPEALS, }
February 1846. }

JOHNSON, CH.

For the facts of the case, I refer to the Decree of the Circuit Court, and shall proceed directly to the consideration of the questions raised by the Grounds of Appeal, under certain propositions, which I propose to state in my own way, and for the purpose of avoiding the perplexity which would arise out of presenting in one view the claims of the parties to the property, and several funds in controversy. I propose, in the first place, to consider them in reference to the bequest of Robert Ure alone, supposing that their determination as to that, will conclude all or most of the questions that can arise out of the others.

The bequest of Robert Ure is "to the sole use and behoof, and for the maintenance of a *Minister of the Gospel, according to the Presbyterian profession*, who is or shall be *thereafter*, from time to time *regularly called*, and subscribe the Westminster Confession of Faith, as the confession of his faith, and shall *firmly believe and preach the same to the people there committed, or which shall be hereafter committed to his care and pastoral inspection.*"

It has not been questioned, and I take it for granted, that Mr. White has been regularly ordained a Minister of the Gospel, according to the Presbyterian profession, that he has signed the Westminster Confession of Faith, as the confession of his own faith, and that he was regularly called and ordained Minister of the Presbyterian Church of John's Island and Wadmalaw, and that the Church united itself to the Charleston Union Presbytery about 1790, and was a component part of it, or some other Presbytery, up to the 24th December 1838, when, by a resolution, which was carried by a majority of twelve to three, it declared itself an "Independent Presbyterian Church, absolved from all connection with the Charleston Union Presbytery, and every other Ecclesiastical body, and placed upon the same ground occupied by other Presbyterian Churches in their neighborhood."

The Defendants being the majority, have organized a congregation, and are in possession of the property and funds of the Church, and have retained Mr. White as their Pastor. He is said to have been present at that meeting, but whether he directly assented to the resolution or not, does not appear. The Complainants being a minority, have also organized themselves as a Church, by the election of officers, and have been recognized by the Presbytery, by the Synod and General Assembly of the United States, as the Presbyterian Church of John's Island and Wadmalaw. The causes which led to these proceedings are found

in the memorable schism in the Presbyterian Church in the United States, which took place at the meeting of the General Assembly, held at Philadelphia in 1838. The Defendants were disinclined to enter into that controversy, and set up for themselves. The Complainants, on the contrary, adhered to what is familiarly called the Old School Presbyterian Party, and insist that they constitute the true Church, and as such, are entitled to the funds and property of the church. The Court disclaims altogether, any authority to decide on questions of religious faith, or on the fitness and propriety of the forms of government which a church or congregation may adopt, if it inculcates nothing that is prohibited by law or subversive of good morals.

Within this rule, every Society or Association, whether the object be religious or secular, has the right to adopt such rules for its government, as to them shall seem best fitted to attain the ends of its institution. There is no controversy between these parties as to matters of faith. The faith of both is professedly based on the Westminster Confession of Faith. They differ only in the form of government, and it is that alone which characterises and distinguishes them from each other, and that is the only distinction. They cannot both have the fund, and therefore it becomes necessary to look into their forms of government, not to determine which ought to be preferred, but to ascertain which the Testator intended should have it, and the leading question is, whether he intended this charity for the support of a Minister of an Independent Church, professing to believe in the Westminster Confession of Faith, or the Minister of a Presbyterian Church, organized according to the form of government adopted by that church.

The terms used by the Testator to designate the person for whose benefit this charity was intended, require 1st. That he shall be a "Minister of the Gospel, according to the Presbyterian profession." 2d. That he shall "subscribe the Westminster Confession of Faith, as the confession of his own faith." 3d. That he shall "preach the same to the people committed to his care and pastoral inspection."

The terms are all of familiar use, and when used in reference to the organization of a Presbyterian Church, have an appropriate and well defined meaning. A church is defined in the form of government of the Presbyterian Church, to be a "number of professing Christians," with their offspring voluntarily associated together for divine worship," &c., "and submitting to a certain form of government." These have the power of appointing deacons, to whom the secular affairs of the church, and the care of the poor are committed, and ruling elders, who, with the Pas-

tor, constitute a Judicatory, called the "Church Sessions," which has authority to enforce obedience to the government and discipline of the church, but the organization is incomplete without a Pastor. The mode of obtaining one is pointed out in the 15th chap. of the Form of Government. If the Church is satisfied with the ministration of any licentiate, they present him with a call, in which they promise him, among other things, "all proper support, encouragement and obedience in the Lord." This, if he consent to accept, is presented to the Presbytery to which he belongs, and is regarded there as a petition from the congregation, that he should be installed their Pastor; and it is expressly declared that no candidate or Minister shall receive a call but through the hands of the Presbytery," and if the Presbytery approve it, his installation follows upon his professing, amongst other things, his approbation of the form of government and discipline of the Presbyterian Church, and promising to subject himself to his brethren in the Lord, and the organization of the Church is complete. They have, in the language of the Will, *a Minister of the Gospel according to the Presbyterian profession, regularly called, and a people committed to his care and pastoral inspection.*

The recognition of the Complainants by the Presbytery, the Synod and General Assembly, as a Presbyterian Church, clearly authorizes them regularly to call a Minister of the Gospel, according to the Presbyterian profession, and are in a condition to be committed to his care and pastoral inspection, and it will not be questioned that the Minister of the church, in conforming to the other requirements of the Will, by signing the Westminster Confession of Faith, &c., would answer the description of the person designated.

The Defendants answer, that they too have a complete organization, and equally come within the description, and being the majority of the former congregation, ought to be regarded as the true Church, and the Complainants as dissenters from it. But they have thrown off their allegiance to the Presbytery, and all other Judicatories of the Presbyterian Church, and the question is, whether they now answer the description of the Will, as the persons intended to take.

A Presbyterian Congregation, with its offices, Pastor, Elders and Deacons, is said to be a complete organization in itself, but the Church authorities all agree that it is not independent. Baird, in his work on religion in America, p. 234, chap. 5, says, that "it is a part of an extended whole, living under the same Ecclesiastical Constitution, and therefore subject to the inspection and control of the Presbytery, whose business it is to see that

"the standards of doctrines and rules of discipline are adhered to by all the separate churches under its care. It is the Court of review and control, over all the sessions of the several churches within its bounds. The supervising body, bound to see that the Pastors are faithful in the discharge of their duties, having also authority to license and ordain candidates for the ministry," &c. To the Presbytery is superadded the higher judicatures of Synods and General Assemblies, as the means of preserving the standards of doctrine and discipline on a more extended territorial scale.

Such has been the organization of the Presbyterian Church in Scotland, from the time of John Knox to this day, and has been substantially followed by the Presbyterian Church in England and the United States.

Synods and General Assemblies do not seem to be indispensably necessary, as the Presbytery is, in itself, a complete and independent organization. They are only necessary when the number and territorial extent of the churches are too great to be under the control of the Presbyteries, and are calculated to preserve greater uniformity in doctrine and discipline than a wider extent of territory. The Rev. Mr. Forrest, the witness, was right therefore, in saying, that there could be no Presbyterian Church without a Presbytery. According to the form of government, no congregation can *regularly call* a Minister, nor can a Minister be ordained to a particular Church, but through the Presbytery, and that upon his professing to approve of the government and discipline of the Presbyterian Church, and consenting to receive and adopt the confession of faith of the Church, &c. The congregation, on their part, promising, among other things, to "submit to him in the due exercise of discipline." In this way, and in this alone, can a *Minister of the Gospel, according to the Presbyterian profession, be regularly called, and the people (the Congregation) committed to his care and pastoral inspection*—and it follows, that without it, a Presbyterian Church could not be perpetuated. The Presbytery could not ordain a Minister, nor commit a people to his care and inspection. The Independent Churches, on the contrary, maintain that each congregation of Christians, that meet in one house for public worship, is a complete church, has sufficient power to act and perform every thing relating to religious government within itself, and is in no respect subject or accountable to other churches. (Buck's Theo. Dic'n., Article—Independents.) And although they may profess the same faith, teach the same doctrines, and practice the same ordinances as another sect, governed by different rules, they are always marked by something to distinguish them from each

other, most frequently by some epithet characteristic of their form of government and discipline. The Defendants have assumed the name and character of an Independent Church, by which they are distinguished from the Presbyterian Church, as clearly as the Roman Catholic Church is from the Protestant Episcopal Church—and it would be a perversion to suppose that by the terms "Minister of the Gospel, according to the Presbyterian profession," the Testator meant a Minister of an Independent Church.

It is not certainly known, that any Presbytery existed in the State at the date of the Will, nor is there any direct evidence of the existence of one, until 1755, nor does it appear when that was organized, and it is argued that the Testator could not have contemplated a minister of a regularly organized Presbyterian Church, on account of the inconvenience of this church connecting itself with a Presbytery; and we are therefore ignorant whether it was an independent church or not, at the date of the Will; but upon referring to the clause of the Will before cited, it will be seen that the donation was for the support of a minister "hereafter" to be called, and if it was an independent church, I should conclude that the donation was intended as an inducement to the church, to submit to the authority of Presbytery, and thus to preserve the great landmarks of faith and discipline.

Usage is often called in to aid in the interpretation of words of doubtful import, and may be safely depended on in such cases; but cannot control the obvious intent. The language of Lord Eldon in the *Attorney-General v. Pearson*, is that "where an institution exists for the purpose of public worship, and it cannot be discovered from the deed, declaring the trust, what form or species of worship was intended, the Court can find no other means of deciding, than through the medium of inquiry into what had been the usage of the congregation in respect to it; and if the usage turns out, on inquiry, to be such as can be supported, I take it to be the duty of the Court to administer the trust, in such manner as best to establish the usage. But if on the other hand, it turns out, that the institution was established for the express purpose of such form of religious worship, or the teaching of particular doctrines, as the founder has thought most conformable to the Christian religion, I do not apprehend that it is in the power of individuals, having the management of that institution, at any time, to alter the purpose for which it was founded, or say to the remaining members, 'we have changed our opinions, and you who assemble in this place for the purpose of hearing the doctrines prescribed by the founder, shall no longer enjoy the benefit he intended for you, unless you conform to the alterations in our

opinions.' The Court have nothing to do with the merits of the original system, as it is the right of those who founded the institution, and who gave their money for its establishment, to have the trust continued as it was intended."—3 Meriv. 400, 18.

If it be assumed, that this was an independent church, at the date of the Will, and that the minister was provided for, out of this fund, down to the time of its union with the Charleston Presbytery ; and that an uniform usage for so long a period, would control the obvious intent of the Testator. Yet I collect from the decree of the Circuit Court, that this church was connected with some Presbytery, from about the year 1790, down to the time of secession in 1838, certainly from 1823, so that there is usage against usage, utterly irreconcilable, and we are thrown back on the Will to ascertain the intention of the Testator. The cases of the English Presbyterian Congregation, in the Borough of York *v.* Johnson and others, has been referred to in the Circuit Court decree, for the purpose of showing, that by the terms " English Presbyterian Congregation," the founder of the charity did not mean a Presbyterian Church, subject to the jurisdiction of Presbytery ; and did not forfeit its rights, by afterwards uniting with a Presbytery, and then seceding from it. The case of Gable and others *v.* Miller, also cited, is to the same effect. In both, the beneficiary is described by a known and established name, without any addition or qualification, and were left to adopt such form of government as it might think fit, and free to change or alter it, as often as was thought necessary, consistently with the leading objects of the charity. Not so here. The donation in Ure's Will, is not to the John's Island Church, but for the use of a minister of the gospel, according to the Presbyterian profession, who must have a congregation regularly committed to his care ; and Turner's deed expressly superadds, a Presbyterian form of government, as a part of the description.

The facts, that Mr. White was regularly ordained minister of this church, and is himself a member of the Presbytery, is relied on, as establishing his claim, to be supported out of this charity, although the congregation has repudiated its authority. But a minister alone is not enough ; there must be a people under his care, and pastoral inspection,—to whom he must preach the doctrines of the Westminster Confession of Faith. In the act of ordination, as before shewn, the congregation promises obedience to the pastor, and the pastor to the Presbytery ; and the Defendants having violated this undertaking in the act of seceding from the Presbytery, they can no longer be regarded under his care and inspection. He derived his authority, and they the right to a minister, from the Presbytery, upon the pledge of subordination to it ; and having thrown off that authority, and assumed the

right of self-government, they no longer remain the same people —no longer the flock committed to his care. The people described in the Will are wanting, and there is no necessity for a minister.

The question arising under the deed of Robert Turner, is free from all difficulty. The trust there, is for the "Minister or Pastor "of the Protestant Presbyterian Church or congregation of christians, who do, or shall usually meet and assemble together, for "divine worship, at or in their public meeting-house on John's "Island, during the time he should be minister or pastor of the "said congregation, according to the rules and discipline of Presbyterian Church government." He clearly intended not to be misunderstood. It will not be pretended, that the Defendants fall within this description, and I think it fairly deducible from this deed, that there was at the time a congregation then governed according to the rules and discipline of the Presbyterian Church. There were Presbyteries in the United States, at the time of the date of Ure's Will, and however inconvenient, it might have been, it is possible that this church might have been united to a Presbytery at home, or in the kingdom of Great-Britain. No records of the church are left; and from the nature of things, there exists no human being to tell us how the truth was, and we are at liberty to resort to any circumstance calculated to elicit it.

It does not appear from what source the church derived its title to the land, on which the church building was erected, or whether there was any, and what trusts connected with it. But it is sufficient that the church has so long had the possession and use. The rule is, that where a donation to a charitable or religious institution does not create a trust, inconsistent with the trusts declared by the original founder, it will be presumed that the donor intended it should be applied to the same use, and neither the Trustees or corporation, are at liberty to apply it to other objects.

The donation of Thomas Hanscome, of the land, was to the Trustees for the use of the church; and of the money (\$6000) directly to the corporation. Nor is there any evidence, that there was any direct trust declared, as to the donation from the John's Island Society, or the contributions for rebuilding the church; but the necessary inference is, that they were intended for the use of the corporation, and the Defendants insist, that being the majority, they have the right to control the application of them. I agree that the majority of a corporation have the right to direct the application of its funds, and that the Court cannot control them in the legitimate exercise of that power; but the question is, whether the Complainants or the Defendants now constitute

the corporation. The act of 1785, 8 Stat. at Large 128, by which this church was incorporated, after reciting that the John's Island Presbyterian congregation, amongst others, had petitioned to be incorporated, enacts that "the several and respective societies above mentioned, and the several persons who now are, or shall hereafter be members thereof respectively, and the successors, officers and members of each of them shall be, and they are hereby declared to be, severally one body corporate, in deed and in name by the name and style of "The John's Island Presbyterian Congregation," &c. It was, therefore, the members of the Church, and their successors, members of the Church, who were incorporated, and the Defendants having seceded from it, are no longer corporators, and the disposition of these funds belong to the Complainants, who remain members of the Church. These, as well as all the other funds, are said to be in the hands of the Treasurer of the Corporation, and are rightfully so, as regards those arising from the bequest of Ure, the grant of Turner, and the lands devised by Hanscome, (all of which are vested in the Trustees by name, if the Treasurer has been regularly substituted Trustee, and for the purposes of this case it may be assumed that he was, nor is it material in whose hands the funds are—neither the Corporation, the Church, or any other body of men, or an individual, has the right to apply them to any other objects than those prescribed by the donors. The case of the Attorney-General *vs.* The Governors of the Foundling Hospital, and the Attorney-General *vs.* The Earl of Clarendon, referred to in the Circuit Court Decree, abundantly show that the Court will control the execution of the trusts whether the Trustee be an individual or a corporation, and will remove the Trustee if he has abused the trust, and substitute others in his place.

A secondary and subordinate proposition, growing out of the grounds of appeal is, whether evidence was admissible, to show that Mr. White entertained and preached doctrines inconsistent with the Westminster Confession, and although it has, in the view which I have taken of the case, become unimportant, I refer to it for the purpose of reserving the question. I have before disclaimed the authority of the Court to examine into the religious faith of any one, for that he must account to another tribunal, but what he has publicly said or done, is capable of being proved, without resorting to machinery of an inquisition to extort it from him; and I apprehend that where the right of property depends upon the existence or non-existence of the fact, the civil tribunals must of necessity examine into it. It is not difficult to conceive of extreme cases, calculated to illustrate the necessity. As if the Pastor had openly declared his disbe-

lief in the Westminster Confession of Faith, and avowed his belief in the doctrines of the Koran, and preached them to his congregation. In *Herrickson vs. Shotwell*, which I have examined in pamphlet form, (p. 41,) Chief Justice Ewing of New Jersey, asserts in decided terms, the right and power of the Court, to ascertain by competent evidence, the religious belief of any man, or set of men, where the rights of property depend on it, and the same rule is clearly deducible from what is said by the Lord Chancellor in the case of the *Attorney General vs. Pearson*, 3d Meriv. 415.

It will be found necessary to obtain orders for carrying this judgment into effect, and the case is ordered back to the Circuit Court for that purpose.

(Signed,) _____

DAVID JOHNSON.

We concur,

J. JOHNSTON,
B. F. DUNKIN.